

MALAYSIAN REPORTS

PLAYING CARDS (MALAYSIA) SDN. BHD. v.
CHINA MUTUAL NAVIGATION CO. LTD.[F.C. (Raja Azlan Shah C.J., Chang Min Tat F.J. &
Abdoolcader J.) April 16 & May 6, 1980]

[Penang — Federal Court Civil Appeal No. 124 of 1979]

Shipping — Carriage of goods by sea — Bill of lading — Goods not shipped on vessel named in bill of lading — Goods shipped on another vessel — Delay in delivery of goods — When contract of carriage commences — Exceptions in bill of lading — When shippers liable.

The appellant in this case ordered paper board from a company in New York which arranged for the shipment of the goods for consignment to the appellant at Penang on the respondent's ship the S.S. *Priam* against a bill of lading. The S.S. *Priam* was due to arrive in Penang on December 25, 1973 but the goods were not loaded on the ship but were later shipped on another ship of the respondent's line which arrived in Penang on June 13, 1974. The goods were duly delivered to the appellant on June 28, 1974 against the original bill of lading. The appellant claimed damages for breach of duty or contract, alleging that the respondent had by the bill of lading expressly or impliedly contracted to deliver the goods by the S.S. *Priam* but had failed to do so. Gunn Chit Tuan J., dismissed the appellant's claim (vide [1980] 1 M.L.J. 122) on the grounds (a) that on the pleadings the appellant's claim was for non-delivery of the goods and that this claim could not succeed as the goods were in fact delivered; (b) that the respondent had discharged the burden of proving that the goods were never in fact shipped on board the S.S. *Priam* and therefore it was not liable as the carrier to the appellant for damages. The appellant appealed.

Held: (1) although the pleadings in this case were not very precise, both parties knew the case presented by the other and justice required that the substantive issue between the parties be considered. The appellant's claim in this case was in effect for delay in the delivery of the goods;

(2) the shipowner becomes responsible as a carrier for all goods which have been delivered to him or to his authorised agents for the purpose of being carried. It is not necessary that they should actually have got on board. The contract of carriage commences as soon as the shipowner receives the goods but not necessarily on board the ship. In this case the goods were clearly delivered to and received by the respondent, who would therefore be liable, apart from the exceptions in the bill of lading;

(3) the terms of the bill of lading, which provide *inter alia* that the carrier shall not be liable for any loss or damage arising or resulting from delayed or early arrival of the goods and that any under or over carriage shall not be considered a deviation or vitiate any of the terms of the bill of lading, would appear to be a complete defence to the appellant's claim and exempt the respondent from any liability for the delay in delivery of the goods.

Cases referred to:-

- (1) *Farrell v. Secretary of State for Defence* [1980] 1 W.L.R. 172; [1980] 1 All E.R. 166.
- (2) *Sewell v. Burdick* (1884) 10 App. Cas. 74, 105.
- (3) *British Columbia Saw Mill Co. v. Nettleship* (1868) L.R. 3 C.P. 499.
- (4) *Fletcher v. Gillespie* (1826) 4 L.J. (O.S.) C.P. 202.
- (5) *The Ardennes (Owner of Cargo) v. The Ardennes (Owners)* [1950] 2 All E.R. 517.

FEDERAL COURT.

N. Chandran for the appellants.

S. Thillaimuthu for the respondents.

Cur. Adv. Vult.

Abdoolcader J. (delivering the judgment of the Court): The appellant, a manufacturer of playing cards, ordered 16 skids of Kraft Paperboard for the

A purposes of their business from P.L. Thomas Paper Co., Inc. of New York which arranged for the shipment of the goods for consignment to the appellant at the Port of Penang on the respondent's ship the S.S. *Priam* against a bill of lading No. 41 dated November 23, 1973 signed by Furness Withy Agencies (U.S.A.) as agents for the respondent. The *Priam* was scheduled to arrive in Penang on December 25, 1973 but the goods in question were however shut out from that ship and were later shipped on another ship of the respondent's line, the S.S. *Peisander*, on a manifest under bill of lading No. Memo — 1 dated May 7, 1974 to be delivered against the original bill of lading No. 41. The *Peisander* arrived at Penang on June 13, 1974 and the goods were duly delivered to the appellant on June 28, 1974 against the original bill of lading duly endorsed on its behalf.

The appellant issued the writ in these proceedings complaining that the respondent had by the bill of lading in question expressly or impliedly contracted to deliver the goods by the *Priam* which was scheduled to arrive at Penang on December 25, 1973 and that it had suffered damages as a result of the respondent's failure to do so in breach of its duty or contract. Gunn Chit Tuan J., dismissed the appellant's claim (vide [1980] 1 M.L.J. 122), holding, first that on the pleadings the appellant's claim was for non-delivery of the goods and that this claim could not succeed as the goods were in fact delivered albeit later, and second, that the respondent had discharged the burden of proving that the goods were never in fact shipped on board the *Priam*, and therefore it was not liable as the carrier to the appellant for damages. The appellant appealed against this order and after hearing submissions by counsel, we affirmed the decision of the learned judge but for totally different reasons and now give our grounds for doing so.

Before, however, dealing with the substantive contention in dispute, we should perhaps touch on and dispose of the issue regarding the pleadings. The statement of claim is certainly not ideally drafted but it avers that the respondent had contracted by the bill of lading to ship the goods on the *Priam* which was due to arrive at Penang on December 25, 1973 and that by reason of its breach of duty or contract and failure to deliver the goods accordingly, the appellant had suffered specified damages as a result. From this averment and the fact that it was well within the knowledge of the respondent that the goods had in fact been delivered in June 1974 by another ship and not as originally scheduled and that evidence was adduced at the trial was on these lines, we do not think that the respondent was taken by surprise and unable to meet the appellant's case or was unaware of the nature of the claim advanced by the appellant. The position here is quite unlike that which occurred in *Farrell v. Secretary of State for Defence*⁽¹⁾ when the House of Lords held that if negligence on the part of persons other than the soldiers who had fired the shots had been pleaded or alleged at the trial, the trial would have taken a very different course. And, in any event, the defence of the respondent itself left much to be desired as Mr. Thillaimuthu for the respondent in arguing his case before the learned judge departed from his own pleading and submitted that the bill of lading was null and

void as against the respondent and that there was in fact no contract of carriage. In all the circumstances, taking the point on pleadings would give countenance to the adage of the pot calling the kettle black, and as both sides knew the case presented by the other, justice would perhaps require that the substantive issue between the parties be considered as indeed the learned judge himself did notwithstanding his earlier determination that the appellant's claim for damages was untenable in the light of the pleadings.

A bill of lading, briefly, is a document signed by the shipowner or by the master or other agent of the shipowner stating that certain specified goods have been shipped in a particular ship, and setting out the terms on which the goods have been delivered to and received by the ship. It is in effect primarily an acknowledgment of the receipt of the goods specified but except as against the person actually signing it, it is not conclusive and may be controverted by evidence showing that the goods were never in fact shipped. A shipowner, therefore, who has not signed the bill of lading is not necessarily bound by the acknowledgment of receipt signed by his agent. It appears to be settled law that a bill of lading is not in itself the contract between the shipowner and the shipper of goods, as the contract has come into existence before the bill of lading is signed, though it has been said to be excellent evidence of its terms (*Sewell v. Burdick*⁽²⁾ at page 105).

All the authorities canvassed and discussed before the learned judge and referred to by him involve the shipment of goods on board and deal with the question of loss, damage or short-delivery and the liability of the shipowner therefor. None of them deal with non-shipment or delay in delivery but the learned judge says in his grounds of judgment that counsel on both sides relying on these authorities concurred in advancing the proposition, and to this the learned judge assented, that the bill of lading in the matter before us could not be regarded as a contract between the parties because the goods in question were never put on board the *Priam* and its master (presumably referring to the carrier's agents) in this case had accordingly no authority from the respondent as carrier to make a contract of carriage, and he says he therefore did not think it necessary to consider the effect of the exception clause in the bill of lading.

The appellant's claim in this case, however, is in effect for damages for delay in the delivery of the goods, and the question that arises for consideration and determination is whether the goods were delivered to the respondent though not on board, when its responsibility commenced and the terms of the contract of carriage and the effect of any exception clauses therein. The shipowner becomes responsible as a carrier for all goods which have been delivered to him, or to his authorised servants, for the purpose of being carried. It is not necessary that they should actually have got on board. Thus, delivery to the mate on the quay, alongside which the vessel is lying, is sufficient (*British Columbia Saw Mill Co. v. Nettleship*⁽³⁾). The responsibility of the shipowner for the goods attaches as soon as they are delivered to his servants. The subsequent expenses and risks of putting the goods into the ship are generally borne by the shipowner and

subject to any express agreement (*Fletcher v. Gillespie*⁽⁴⁾), he must provide the men and tackle to bring them to the ship's side and to place them on board. The contract of carriage accordingly commences as soon as the shipowner receives the goods but not necessarily on board the ship.

In this case the respondent's local agents, Malaysian International Shipping Corporation Berhad, in an advice note dated December 27, 1973 to the appellant clearly acknowledged receipt of the goods for shipment by the *Priam* in advising it of the consignment in question on board the *Priam* due to arrive on December 25, 1973 and asking for instructions for the manner and place of delivery required. That the goods were in fact delivered to and received by the respondent is further reiterated in its agents' letters of April 17, 1974 to the appellant's solicitors and of May 29, 1974 to the appellant and is also confirmed by the shippers of the goods in their letter of December 4, 1973 to the appellant.

As we have pointed out earlier a bill of lading is excellent evidence of the terms of the contract of carriage between the shipowner and the shipper of goods, and the exceptions in the contract of carriage may apply before loading begins, and indeed that is the very effect of the specific terms of the bill of lading in this case. The reverse side of the bill of lading speaks of 'Received from the shipper'. It does not say 'and shipped' or 'on board'. It specifically states that if the goods in whole or in part are shut out from the *Priam* for any cause, the carrier shall have the right to forward them under the terms of the bill of lading by another ship of the same Line or service or at the carrier's option by a ship of another Line. It goes on to say that it is agreed that the receipt, custody, carriage and delivery of the goods are subject to the terms appearing on the face and back of the bill which shall govern the relations, whatever they may be, between all parties concerned in every contingency wheresoever and whensoever occurring whether the carrier be acting as such or as bailee and also in certain events at the time of loading or inception of the voyage. All these references clearly point to the receipt of the goods by the respondent and not shipment on board, and there is in our view accordingly no substance in the contention of Mr. Chandran for the appellant that the conditions of the bill of lading would only apply after the goods had been received on board. Mr. Chandran had perforce to agree when we put this to him that the contract of carriage commences when the goods are delivered and not necessarily when shipped on board.

Clause 9 of the bill of lading is a specific exception clause and provides for a number of matters and events, and empowers the carrier or master in its or his discretion at any time and place, whether or not the reason for its or his action or inaction was known at the time of receipt of the goods, once or oftener and without notice to the shipper or consignee, *inter alia*, to substitute another ship whether before, during or after loading the goods or any part thereof and whether the substituted ship arrives or departs or is scheduled to do so before or after the ship named in the bill, and in case the goods or any part thereof are shut out from the ship named to have that ship

proceed without the goods or a part thereof and to forward the goods in whole or in part by any means to or towards the port of discharge at the risk and expense of the goods. It also stipulates that the carrier is not required to, and does not undertake to deliver the goods at the port of discharge or elsewhere at any particular time or to meet any market or in time for any particular use nor does it undertake that the ship or substitute ship will sail or arrive at any stated or scheduled time, and that the carrier shall not be liable for any loss or damage arising or resulting from delayed or early arrival of the goods or any damage or expense incurred by the shipper or consignee because of any change in date or time of sailing or arriving. It also provides that any under or over carriage shall not be considered a deviation nor shall it vitiate any of the terms of the bill. The terms of the bill of lading we have referred to appearing at the top on the reverse side and in clause 9 would therefore appear to be a complete defence to the appellant's claim, and exempt the respondent from any liability for the delay in delivery of the goods.

Mr. Chandran, however, submits that the exception clause in the bill does not exonerate the respondent from liability for the delay in delivery, and relies on *The Ardennes (Owner of Cargo) v. The Ardennes (Owners)*.⁽⁵⁾ That case, however, is wholly distinguishable on its facts and was decided on the basis that evidence was admissible of the contract of carriage which was made before the bill of lading was signed and which contained a different term which was at variance with the clause in the bill enabling the carrier to carry the goods by that or any other ship or railway either belonging to it or to other persons and providing for deviation. Lord Goddard C.J., specifically stated that he had no hesitation in finding on the evidence that there was a promise made to the plaintiff's representative in that case that the ship should proceed direct to London and that he shipped in reliance on that promise, and he held that evidence as to the true contract was admissible where it was made before the bill was signed and it was different from that found in the document or contained some additional term. He found that the representation that the ship would sail direct to London would amount to a warranty, for it was in consequence of that representation that the goods were shipped, both parties being fully aware of its high importance in the circumstances, and that, in other words, it was a promise that the shipowner would not avail himself of a liberty which otherwise would have been open to him. There is no such contract or term in the case before us which would bring it within the ambit of the ratio in *The Ardennes*, *supra*.

Mr. Chandran, however, contends that the respondent is not exempted from liability because of the peculiar circumstances of the case, and argues that by virtue of the representation made by the respondent in its agents' advice note of December 27, 1973 that the goods in question were due to arrive on the *Priam* on December 25, 1973 and requiring the appellant to arrange to take delivery, the respondent had waived the conditions of the bill of lading. We regret we are unable to follow this line of argument and can find no substance in it whatsoever. The conditions in the bill specifically provide for exemption from

A liability on the part of the carrier when the goods are shut out and are designed to cover exactly the sort of situation that has arisen in this case. The advice note from the respondent's agents is not a representation which would vitiate the conditions of the bill and the logical extension of any argument on the lines Mr. Chandran propounds would mean that the mere fact that the bill itself speaks of shipment by the *Priam* would be a representation vitiating the conditions on the reverse side of the bill. We reiterate that the bill specifically provides that it is agreed that the receipt, custody, carriage and delivery of the goods are subject to the terms appearing on the face and back of the bill and further that none of the terms of the bill shall be deemed waived by the carrier unless by an express written waiver signed by a duly authorised agent of the carrier.

We accordingly find that as there is no evidence of any other conditions of the contract of carriage which would affect the situation apart from those in the bill of lading itself which is consequently the best evidence of its terms, the provisions in the bill we have referred to afford a complete answer by way of defence to the appellant's claim. We therefore dismissed the appellant's appeal with costs but for wholly different reasons from that of the learned judge, and ordered the deposit in court by way of security to be paid out to the respondent to account of costs.

E *Appeal dismissed.*

Solicitors: *Presgrave & Matthews; Thillaimuthu & Phock Kin.*

F **BHIKKU DAENG & ANOR. v. MAUNG SHWE TYN & ANOR.**

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat F.J. & Abdoolcader J.) April 15 & May 14, 1980]

[Penang — Federal Court Civil Appeal No. 202 of 1979]

G *Trust — Temple — Trustees to be elected by Burmese and Thai community — Burmese trustee elected by Burmese community — Consent of Attorney-General given — Objection by surviving Thai trustees — Power of court — Costs.*

H In this case the trust instrument provided that a temple in Penang should be managed by four trustees, two to be elected and appointed by the Burmese community and two to be elected and appointed by the Thai community. A vacancy having arisen in the position of Burmese trustee, a meeting of the Burmese community in Penang was held which elected the second respondent. Consent was given by the Attorney-General for proceedings to be taken for the appointment of the second respondent as trustee. The surviving Thai trustees, the appellants in this case, objected to the appointment of the second respondent and an application was therefore made to court by the first respondent the surviving Burmese Trustee and the second respondent for the appointment of the second respondent as Trustee.

I The appellants objected to the appointment on the grounds (a) that the meeting called for the election was called by the Chief Monk who was on a visit pass; (b) that the notice of meeting was published in the National Echo which was not addressed specifically to the Burmese Community in Penang and (c) that the second respondent was not an inhabitant of Penang. The second respondent was an Assistant Superintendent of Police and was of Penang origin. The learned trial judge rejected the objections and approved the appointment of the second respondent. The appellants appealed.